

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs November 22, 2000

**STATE OF TENNESSEE v. MICHAEL HARLEY SMITH**

**Interlocutory Appeal from the Circuit Court for Jefferson County**  
**No. 5799 O. Duane Slone, Judge**

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**No. E1999-02722-CCA-R9-CD**  
**January 2, 2001**

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The defendant, Michael Harley Smith, was charged with aggravated burglary and one count of theft over \$1,000. See Tenn. Code Ann. §§ 39-14-403, 39-14-103. The state denied his application for pretrial diversion. Upon petition for writ of certiorari, the trial court found that the assistant district attorney general had not abused his discretion. Because the office of the district attorney failed to properly consider the defendant's application, the judgment of the trial court is reversed.

**Tenn. R. App. P. 9; Judgment of the Trial Court Reversed.**

GARY R. WADE, P.J., delivered the opinion of the court, in which JOE G. RILEY and THOMAS T. WOODALL, JJ., joined.

Edward C. Miller (on appeal), Public Defender, Fourth Judicial District, and Lu Ann Ballew (at trial), Assistant Public Defender, for the appellant, Michael Harley Smith.

Paul G. Summers, Attorney General & Reporter; Elizabeth B. Marney, Assistant Attorney General; and Charles L. Murphy, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

Count one of the indictment alleges that the defendant entered a residence with the intent to commit theft; count two alleges that the defendant stole a "television . . . VCR and assorted household items." The record demonstrates that the defendant and two other individuals made confessions to the police. Little else regarding the circumstances of the offenses is included in the record.

On June 20, 1996, the defendant applied for pretrial diversion pursuant to Tenn. Code Ann. § 40-15-105. The application included the following information:

1. The defendant was 20 years old at the time of the offenses. He is a resident of Sevierville, Tennessee.

2. The defendant is single. His parents live and work in Michigan.
3. The defendant has no history of mental illness.
4. The defendant is a high school graduate and, at the time of the application, was employed full-time by Manis Electric and part-time by Damon's Restaurant, both of which are located in Pigeon Forge, Tennessee.
5. With the exception of the charged offenses and one speeding ticket, the defendant had never been arrested for or convicted of any criminal offense.<sup>1</sup>
6. When the defendant was confronted by law enforcement officers about his involvement in the crimes, he immediately confessed. He is willing and able to pay court costs and "his fair share of restitution."

The application also included a personal letter of reference from a friend and a statement from the defendant's landlord establishing the timely payment of rentals for approximately one year.

On April 13, 1999, almost three years after the application, an assistant district attorney denied the request for pretrial diversion. While noting that it was "to [the defendant's] credit" that he paid his rent on time, was employed, and had incurred no new arrests or convictions since the charged offenses, the assistant district attorney cited the following reasons for denial:

1. That denial of the application was supported by the need for deterrence: "Home burglary is a serious problem in Jefferson County and the prosecution of home burglaries is an effective deterrent to others who would commit home burglaries and sends a strong message that burglaries will be punished."
2. That the circumstances of the offenses justified denial of the application: "The circumstances in this case show that this defendant willfully committed a home burglary and theft of a family's property while they were away from home."
3. That denial of the application was "necessary . . . to avoid depreciating the seriousness of the offense[s]."
4. That a grant of pretrial diversion "would not serve the interests of justice and would be a failure of the Criminal Justice System to protect the citizens of Tennessee and Jefferson County . . . ."

Pursuant to Tenn. R. Crim. P. 38, the defendant filed a petition for writ of certiorari, contending that the prosecutor had abused his discretion by denying the application for diversion. At the hearing on the petition, the trial court expressed concern regarding the length of time that had elapsed between the application and the denial. Nevertheless, the trial court concluded that there was no abuse of discretion:

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<sup>1</sup> Apparently, the defendant was cited for and perhaps convicted of a misdemeanor offense, for which he served no period of incarceration, in Michigan in January, 1999. Some six months later, at the time of the hearing on the defendant's petition for writ of certiorari, the conviction did not appear on the defendant's record. The state did not assert at the hearing that the offense disqualified the petitioner from diversion consideration.

I do find that the District Attorney General considered carefully this defendant's request to be placed on pretrial diversion status. They did consider the positive factors as outlined by this defendant as well as the other factors, particularly the nature of the crime which is burglary of a home and theft of a family's property while they were away from home. They cite that as punishment confinement would be necessary to avoid deprecating the seriousness of the offense. However, while that may not be exactly the case it was at least appropriate for the District Attorney General's Office to consider that.

They also cite that home burglary is a serious problem in Jefferson County, and the prosecution of home burglaries is an effective deterrent to others who are similarly situated.

While that in and of itself can't be a basis for denial, it can be a factor that's weighed heavily in deciding whether to grant the extraordinary relief that this defendant requests. . . .

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But the Court cannot find under the facts of this particular case that there's a patent and gross abuse of discretion by the District Attorney General's Office in failing to enter into the memorandum of understanding. So the request to order the District Attorney General to enter into a memorandum of understanding for patent and gross abuse of their discretion is denied.

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I like giving young people an opportunity to preserve a clean record, but . . . I don't think a pretrial diversion agreement's appropriate. You're not pleading guilty. You may not be. But this isn't an appropriate case for that and I'm of the opinion people ought to go to jail for these types of offenses. How much depends on the person. But you can plead guilty just about any time you want to and . . . in open Court.

Pretrial diversion authorizes a district attorney general to suspend prosecution against a qualified defendant for a period of up to two years. Tenn. Code Ann. § 40-15-105(a)(1)(A) (Supp.

1995).<sup>2</sup> A defendant that is statutorily eligible for pretrial diversion is not presumptively entitled to the program. Whether a qualified defendant receives a grant of pretrial diversion is discretionary with the district attorney. State v. Hammersley, 650 S.W.2d 352, 353 (Tenn. 1983); State v. Carr, 861 S.W.2d 850, 855 (Tenn. Crim. App. 1993).

In making the initial determination upon a request for diversion, the district attorney general should consider (1) the circumstances of the offense; (2) the defendant's criminal record; (3) the defendant's social history; (4) the defendant's physical and mental condition; (5) the deterrent effect of punishment upon other criminal activity; (6) the defendant's amenability to correction; (7) the likelihood that pretrial diversion will serve the ends of justice and the best interests of the defendant and the public; and (8) the defendant's "attitude, behavior since arrest, prior record, home environment, current drug usage, emotional stability, past employment, general reputation, marital stability, family responsibility and attitude of law enforcement." State v. Washington, 866 S.W.2d 950, 951 (Tenn. 1993) (quoting State v. Markham, 755 S.W.2d 850, 852-53 (Tenn. Crim. App. 1988)).

A denial of pretrial diversion must be in writing and must include "an enumeration of the evidence that was considered and a discussion of the factors considered and weight afforded each." State v. Pinkham, 955 S.W.2d 956, 960 (Tenn. 1997). In State v. Brown, this court provided three reasons for requiring a written response:

First, the statement would compel the prosecutor to think about and justify his denial in terms of the applicable standards. Second, the statement of reasons would define the area of controversy at the evidentiary hearing. Finally, the statement of reasons would restrict the prosecutor to a particular rationale and insure that the prosecutor would offer no new reasons at the evidentiary hearing.

700 S.W.2d 568, 570 (Tenn. Crim. App. 1985). There must be "more than an abstract statement in the record that the district attorney general has considered these factors." State v. Herron, 767 S.W.2d 151, 156 (Tenn. 1989). The factors considered "must be clearly articulable and stated in the record . . . ." Id. While the defendant has the burden of demonstrating his suitability for diversion, that does not relieve the district attorney of the obligation to examine all relevant factors. Id.

The district attorney should identify any areas of factual dispute. Brown, 700 S.W.2d at 570. The circumstances of the case and the generalized need for deterrence, when relied upon by the district attorney, "cannot be given controlling weight unless they are 'of such overwhelming significance that they [necessarily] outweigh all other factors.'" Washington, 866 S.W.2d at 951

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<sup>2</sup> At the time of the offense, the petitioner qualified for pretrial diversion. This year, however, Tenn. Code Ann. § 40-15-105 was amended to disqualify those charged with aggravated burglary. See Tenn. Code Ann. § 40-15-105(a)(1)(B)(iii)(c) (Supp. 2000). The statute in effect at the time of the charged offense applies. See Boykins v. State, 584 S.W.2d 194, 196 (Tenn. 1979) (holding that retroactive application of stricter probation standard would be violative of prohibition against ex post facto laws).

(quoting Markham, 755 S.W.2d at 853) (emphasis in original). Where there are no "such exceptional circumstances, 'the district attorney general must consider evidence which tends to show that the applicant is amenable to correction [by diversion] and is not likely to commit further criminal acts.'" Id. (quoting Markham, 755 S.W.2d at 853). "The decision of a district attorney general granting or denying pretrial diversion to an accused is said to be 'presumptively correct'; and the decision should not be set aside unless there has been a 'patent or gross abuse of prosecutorial discretion.'" State v. Perry, 882 S.W.2d 357, 360 (Tenn. Crim. App. 1994) (quoting Pace v. State, 566 S.W.2d 861, 870 (Tenn. 1978)).

When an application for pretrial diversion has been denied by the district attorney, the defendant may appeal to the trial court for a writ of certiorari. Tenn. Code Ann. § 40-15-105(b)(3) (Supp. 1995). The trial court may only consider the evidence considered by the district attorney general. State v. Winsett, 882 S.W.2d 806, 810 (Tenn. Crim. App. 1993). The trial court, after first determining whether the defendant is eligible for diversion, may conduct a hearing to resolve any factual disputes between the state and the defense but may not hear evidence not considered by the district attorney. Pinkham, 955 S.W.2d at 960.

In order for the trial court to grant relief to the defendant, the record must show an absence of any substantial evidence to support the denial of pretrial diversion by the district attorney. If the preponderance of the evidence supports the decision of the trial court, the judgment must be affirmed on appeal. Pinkham, 955 S.W.2d at 960; State v. Lutry, 938 S.W.2d 431, 434 (Tenn. Crim. App. 1996).

In State v. Curry, 988 S.W.2d 153, 158 (Tenn. 1999), a case in which a City of McKenzie clerk had embezzled \$27,000 over a three-year period, our supreme court reversed a district attorney general's denial of pretrial diversion because the district attorney had relied almost solely on the circumstances of the offense:

Although the prosecutor asserts that he had "carefully reviewed the application and the attached letters, the denial does not discuss the defendant's favorable social history, lack of criminal record, and potential for rehabilitation. Moreover, assuming these essential factors were, in fact, considered, there is no explanation as to how much weight they were afforded and no rationale as to why they were outweighed by the other factors in denying diversion.

Thereafter, in State v. Norman Jeffrey Pipkin, No. W1998-02738-CCA-RM-CD (Tenn. Crim. App., at Jackson, May 24, 2000), which was remanded to this court for reconsideration in light of State v. Curry, this court observed as follows:

[In State v. Curry,] our supreme court cautioned that while the circumstances of the offense and the need for deterrence may alone justify denial of diversion, that is so "only if all of the relevant factors

have been considered as well." In several cases, this court has ruled that the nature and circumstances of an alleged offense are not only an appropriate factor to be considered upon application for diversion, but also may alone provide a basis for denial. It is important, however, to recognize that practically every criminal case is serious, and that only an analysis of all relevant factors, favorable and otherwise, assures proper consideration of an application for pretrial diversion. In Curry, our supreme court complimented the district attorney who had appropriately denied diversion in Pinkham because he had "extensively discussed the relevant factors, identified the evidence considered, and set forth the weight afforded to each factor as well as the rationale for his conclusion." In Curry, . . . [o]ur high court observed as follows:

There was no apparent consideration given to the defendant's lack of criminal record, favorable social history, and obvious amenability to correction. Moreover, the prosecutor did not articulate or state why those factors that were considered, i.e., seriousness of the offense and deterrence, necessarily outweigh the other relevant factors. The evidence presented is a close case on the diversion question; however, the failure by the prosecutor to consider and articulate all of the relevant factors constitutes an abuse of discretion. . . . Finally, we also conclude that the Court of Criminal Appeals erred in remanding the case for an evidentiary hearing in order for the prosecutor to "fill in the gaps" and correct any deficiencies in the record. First, the procedure adopted by the Court of Criminal Appeals decreases the importance of the written response and increases the risk that new reasons or considerations will be introduced during the hearing without notice to the defendant. Second, the standards of review governing certiorari proceedings require the trial court to consider only that which has already been considered by the prosecutor.

In our view, the decision in Curry clarifies and perhaps extends the degree of analysis required by the district attorney general in consideration of an application for pretrial diversion. Careful consideration must be given to the "defendant's lack of criminal record, favorable social history, and obvious amenability to correction."

Slip op. at 7-8 (citations omitted).

Like Pipkin, this case is clearly controlled by the decision of our supreme court in Curry. Initially, the assistant district attorney did not recite the evidence that he had considered in denying

the application. Nor is there a complete discussion of the various applicable factors and the weight afforded each factor. While the letter sets forth four factors underlying the denial, the factors are no more than abstract statements, with no indication of why they outweighed all other factors. Likewise, while the letter makes note of the defendant's ability to support himself, steady employment history, and lack of other arrests or convictions, it fails to assign any weight to those factors and fails to address the defendant's amenability to correction. Finally, there was no explanation as to how deterrence might have outweighed all other considerations. In our view, the Curry decision requires that the judgment of the trial court be reversed and that the defendant be placed in a pretrial diversion program.

Accordingly, the judgment is reversed and the cause is remanded to the trial court. The trial court shall grant the defendant pretrial diversion under such terms and conditions as are deemed appropriate under all circumstances.

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GARY R. WADE, PRESIDING JUDGE